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# Criminal Procedure: Pretrial, Trial and Appeal

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# CRIMINAL PROCEDURE: PRETRIAL, TRIAL AND APPEAL

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This Article details significant developments in the area of state criminal procedure during the Survey period. The Texas Court of Criminal Appeals issued a number of important decisions, although most clarified prior decisions of the Court concerning criminal procedure. A discussion of the procedural aspects of confession, search, and seizure law is not included, as those subjects are addressed elsewhere in the Survey.

## I. LEGISLATIVE PROCEDURAL CHANGES

Of the 5,500 bills considered by the end of the 75th Legislative session, approximately 130 changes were made to the Penal Code (substantive criminal law) and to the Code of Criminal Procedure. Several procedural changes addressed time constraints.

### A. TIME LIMITS

Procedural changes designed to hasten consideration of death penalty cases continue. An application for writ of habeas corpus in such cases must be filed no later than 180 days after appointment of counsel, or no more than forty-five days after the date that appellee's original brief is filed on direct appeal.<sup>1</sup> For the first time, the State is required to answer the application for a writ of habeas corpus no more than thirty days after the state receives notice of the writ.<sup>2</sup> Furthermore, the parties must now submit proposed findings of fact and conclusions of law,<sup>3</sup> and, if requested by the appellate court, the presiding judge of the convicting court must issue findings of fact and conclusions of law.<sup>4</sup>

Continuing a trend to enlarge statutes of limitations, particularly with respect to sexual offenses, limitations applicable to certain sexual offenses against children were extended to ten years from the date of the victim's eighteenth birthday.<sup>5</sup>

The period within which an indictment or information must be presented in order to avoid dismissal of the pending charge against a defendant is 180 days or, with the recent change in the law, within two terms of the grand jury.<sup>6</sup> This effectively extended the time within which to present an indictment.

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1. See TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (Vernon Supp. 1998).

2. See *id.* art. 11.071, § 7(a).

3. See *id.* art. 11.071, § 8(b) (where the court has determined that no controverted, unresolved factual issues material to the applicant's confinement exist); *id.* art. 11.071, § 9(e) (where such issues do exist).

4. See *id.* art. 11.071, § 8(c) (findings without an evidentiary hearing); *id.* § 9(e) (following evidentiary hearing).

5. See *id.* art. 12.01(5). These offenses are indecency with a child (TEX. PEN. CODE ANN. § 21.11(a)(1) (Vernon 1989)); sexual assault or aggravated sexual assault of a child (TEX. PEN. CODE ANN. §§ 22.011(a)(2), 22.021(a)(1)(B) (Vernon 1989)).

6. An indictment or information must be presented by the next term of court or within 180 days (whichever period is longer). Otherwise the charge must be dismissed and bail discharged. See TEX. CODE CRIM. PROC. ANN. art. 32.01 (Vernon Supp. 1998). A

Courts may now extend the period of community supervision in misdemeanor cases an additional two years beyond the three-year limit if the defendant has failed to pay fines, costs, or restitution, and the court determines that payment is likely to be made if community supervision is extended.<sup>7</sup>

For certain sexual offenses, the court may impose a one-time extension of community supervision an additional ten years if, following a hearing, the court finds "the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public. . . ."<sup>8</sup>

## B. OTHER LEGISLATIVE CHANGES

Deferred adjudication is no longer permitted for certain sexual offenses unless the court makes a finding that deferred adjudication is "in the best interest of the victim."<sup>9</sup> A defendant previously charged with any of these sexual offenses and placed on community supervision is ineligible to receive deferred adjudication for these offenses.<sup>10</sup>

Mandatory community supervision for state jail felonies has been abolished.<sup>11</sup> The court now has discretion either to suspend the sentence (unless the defendant has a prior felony conviction),<sup>12</sup> or to order that the sentence be carried out. Furthermore, the court may impose a minimum term of 90 to 180 days in a state jail as a condition of supervision.<sup>13</sup>

It is now clear that a defendant in a misdemeanor case may waive trial by jury regardless of whether he is represented by counsel at the time of the waiver.<sup>14</sup> In felony cases, however, the court must appoint an attorney to represent the defendant before he may waive his right to a jury trial.<sup>15</sup>

In a significant change that may herald a change in court proceedings of the future, the Code of Criminal Procedure now permits a court to accept a plea or waiver of the defendant's rights by closed-circuit television, provided that both the defendant and the State consent in writing to this procedure.<sup>16</sup> This procedure is acceptable, however, only if simultaneous full motion video and interactive communication are provided.<sup>17</sup>

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defendant released for this reason may be rearrested for the same conduct only upon presentation of a new indictment or information. *See id.* art. 15.14.

7. *See id.* art. 42.12, § 22(c).

8. *Id.* art. 42.12, § 22A(a).

9. *Id.* art. 42.12, § 5(a). The sexual offenses covered are indecent exposure, indecency with a child, sexual assault, aggravated sexual assault, aggravated kidnapping with intent to commit sexual abuse, burglary with intent to commit a sexual offense, sexual performance by a child, or child pornography.

10. *See id.*

11. *See* TEX. PEN. CODE ANN. § 12.35(a) (Vernon 1989).

12. *See id.*

13. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(d) (Vernon Supp. 1998).

14. *See id.* art. 1.13(c).

15. *See id.*

16. *See id.* art. 27.18.

17. *See id.* art. 27.18(a)(2).

Moreover, the defendant and his attorney must be able to communicate privately without being overheard or recorded.<sup>18</sup>

A novel privilege has been created which protects the confidential communications between the survivor of a sexual assault and the sexual assault advocate.<sup>19</sup> The privilege against disclosure does not apply, however, if the information embodied in the confidential communication is used in a "criminal investigation or proceeding in response to a subpoena issued in accordance with law."<sup>20</sup>

Polygraph examinations were addressed by the 75th Legislature. If a prosecutor or peace officer requests that a complainant take a polygraph examination, the complainant must be informed that neither refusal to do so nor polygraph results, without more, will result in dismissal of the complaint.<sup>21</sup> Prosecutors and officers may not require a complainant who seeks to charge a person with certain sexual offenses to undergo a polygraph examination.<sup>22</sup>

An interesting change to the Open Records Act<sup>23</sup> limits the exemption from disclosure previously accorded records "maintained for internal use in matters relating to law enforcement or prosecution."<sup>24</sup> Such information is now protected only when: (1) the State can show that disclosure would interfere with law enforcement or prosecution of crime; (2) the information relates to an investigation that did not result in a conviction or deferred adjudication; or (3) the information was prepared by the State's attorney and constitutes attorney work product.<sup>25</sup>

Of utmost importance is the imposition, for the first time, of a good faith requirement regarding pleadings and motions filed by a defendant.<sup>26</sup> Motions and pleadings must be signed by an attorney of record, or the defendant if he is *pro se*.<sup>27</sup> This signature constitutes a certification that the person has read the document, that it is not brought in bad faith, is not groundless, and is not brought for purposes of harassment, unnecessary delay or any other improper purpose.<sup>28</sup> If the document is not signed, the court is required to strike it unless the signature omission is promptly cured.<sup>29</sup> One who files a fictitious pleading for an improper

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18. See *id.* art. 27.18(a)(3).

19. See TEX. HEALTH & SAFETY CODE ANN. art. 44.071 (Vernon Supp. 1998). "An individual may act as an advocate for survivors of sexual assault if the individual has completed a sexual assault training program certified by the department and: (1) is employed by a sexual assault program; or (2) provides services through a sexual assault program as a volunteer under the supervisor." *Id.*

20. *Id.* art. 44.074.

21. See TEX. PEN. CODE ANN. §§ 15.051(b), (c) and (d).

22. See *id.* § 15.051(a) (referring to crimes described in TEX. PEN. CODE ANN. § 21.11 (indecent with a child); § 22.011 (sexual assault); § 22.021 (aggravated sexual assault); and § 25.02 (incest) (Vernon 1994 & Supp. 1998).

23. See *id.* § 552.001 et seq. (Vernon 1994).

24. TEX. GOV'T CODE ANN. § 552.008(b) (Vernon Supp. 1998).

25. See *id.* § 552.108(b).

26. See TEX. CODE CRIM. PROC. ANN. art. 1.052 (Vernon Supp. 1998).

27. See *id.* art. 1.052(a).

28. See *id.* art. 1.052(b).

29. See *id.* art. 1.052(c).

purpose or makes a statement that the person knows to be groundless and false in order to obtain a delay or for purpose of harassment "shall be held guilty of contempt."<sup>30</sup> If a pleading or motion is signed in violation of this article, the court, after notice and hearing, "shall impose an appropriate sanction" which may include payment of costs incurred as a consequence of the filing, including reasonable attorney's fees.<sup>31</sup> The court is to presume that the document is filed in good faith and may impose sanctions only for good cause.<sup>32</sup> "Groundless" is defined as "without basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law."<sup>33</sup>

It is now clear that justice of the peace courts have original jurisdiction in criminal cases where the punishment authorized does not require confinement.<sup>34</sup>

Victim-offender mediation programs received recognition and the potential imprimatur of the court. Before acceptance of a plea of guilty or nolo contendere, and upon request of the victim, the court may assist the victim and the defendant in participating in a mediation program.<sup>35</sup>

## II. DEATH PENALTY CASES

During the Survey period, appeals in death penalty cases continued to receive considerable attention from the Texas Court of Criminal Appeals which consistently resisted challenges to the State's capital punishment scheme. In several cases, the Court simply clarified important holdings of previous cases.

### A. JURORS CANNOT BE TOLD WHAT LIFE IMPRISONMENT MEANS

In several decisions, the Court of Criminal Appeals resisted constitutional challenges predicated upon the defendant's inability to question prospective jurors during voir dire, or to inform the jury during the punishment phase of trial regarding the parole implications of a life sentence in a capital case. In a capital case, life imprisonment means at least thirty-five years actual imprisonment.<sup>36</sup> However, the jury may not be informed of that definition.

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30. *Id.* art. 1.052(d).

31. *Id.* art. 1.052(e).

32. *See id.* art. 1.052(f).

33. *Id.* art. 1.052(h).

34. *See id.* art. 4.11.

35. *See id.* art. 26.13.

36. For offenses committed prior to September 1, 1991, the imposition of life imprisonment in a capital case is the imposition of thirty-five years' imprisonment, and the individual sentenced to life imprisonment must actually serve thirty-five years before becoming eligible for parole. After September 1, 1991, the term is forty years before parole eligibility obtains. A capital murder defendant against whom the state seeks the death penalty is sentenced to life imprisonment if the jury does not make a finding of future dangerousness, or finds that mitigation evidence warrants imposition of a sentence of life imprisonment. *See id.* art. 37.071, §§ 2(b), 2(e), 2(i).

In *Simmons v. South Carolina*,<sup>37</sup> the United States Supreme Court held that a jury must be told of parole eligibility when the prosecution argues future dangerousness in support of the death penalty.<sup>38</sup> The Court of Criminal Appeals in *Eldridge v. State*<sup>39</sup> reiterated that *Simmons* does not require a similar result in Texas, because in Texas, unlike South Carolina, a life sentence does not mean life without parole.<sup>40</sup> The Supreme Court's mandate in *Simmons* was based upon the right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.<sup>41</sup>

The *Eldridge* decision, however, also indicated that informing juries of the parole consequences of a life sentence may be required in certain circumstances.<sup>42</sup> The Court noted that such a requirement "would obtain only if a defendant has shown other evidence that, in combination with parole eligibility, tends to show that a capital defendant will not be a future danger to society."<sup>43</sup>

The Court's unanimous decision in *Eldridge* is highly significant for its suggestion that evidence of parole eligibility, while not relevant to future dangerousness when standing alone, may well be relevant and therefore admissible in combination with other evidence that would "tend to show that appellant or people like him and in his position will not 'commit criminal acts of violence that would pose a continuing threat to society.'"<sup>44</sup> Thus, an important question is left open by *Eldridge*—whether the prohibition against informing jurors of the parole consequences of a life sentence would be constitutionally infirm when an offer of proof is made that minimum parole eligibility in combination with other factors tends to show that the defendant or persons similarly situated would not pose a continuing threat to society.

The Court in *Eldridge* did not state what kind of evidence might defeat the prohibition against informing the jury about the meaning of life imprisonment in a capital case, if offered in combination with parole ineligibility for thirty-five or forty years for the capital murder defendant

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37. 512 U.S. 154 (1994).

38. *See id.* at 162.

39. 940 S.W.2d 646, 651 (Tex. Crim. App. 1996) (en banc).

40. *See id.* at 651. In this respect, *Eldridge* simply followed earlier rulings. In *Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995) the Court held, "The matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial. . . . A jury's only task at the punishment phase is to answer the special issues as required in Art. 37.071." *Id.* The Court's plurality opinion in *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995) (en banc) previously held that the mandate in *Simmons* did not apply in Texas. *See id.* at 849.

41. The Supreme Court in *Simmons* did not reach the Eighth Amendment argument presented. *See Simmons*, 512 U.S. at 154. However, the plurality opinion in *Smith* held that the prohibition against disclosure of parole eligibility information to the jury did not violate the Eighth Amendment. *See Smith*, 898 S.W.2d at 853.

42. *See Eldridge*, 940 S.W.2d at 651.

43. *Id.* (citing *Willingham v. State*, 897 S.W.2d 351, 359 (Tex. Crim. App. 1995)).

44. *Id.* at 651 (citing TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (Vernon Supp. 1998)).

receiving a life sentence.<sup>45</sup> It was unnecessary to reach the question there because appellant offered no such evidence. The precise language used by the Court is instructive. The Court expressly refers to evidence regarding the defendant or one in his position.<sup>46</sup> Imposition of a sentence of life imprisonment upon a twenty-five year old defendant would mean that the defendant would be ineligible for parole until age sixty or sixty-five. One must wonder, in light of the Court's caveat in *Eldridge*, whether a proffer of evidence that persons in that age bracket are unlikely to pose a future danger to society is the type of evidence likely to render parole ineligibility a relevant factor that should be communicated to the jury.

After its decision in *Eldridge*, the Court of Criminal Appeals reiterated its holding that a jury may not be informed about minimum prison terms in a capital case, without the elaboration given in *Eldridge*.<sup>47</sup> The Court also repeated its holdings that parole and minimum prison terms are not proper subjects for voir dire questioning in a capital case in *Rhoades v. State*.<sup>48</sup> The Court in *Rhoades* rejected once more the argument that article 37.071 is unconstitutional because the jury is not apprised of the minimum mandatory sentence involved in the imposition of a life sentence in a capital case.<sup>49</sup> The Court also rejected the argument that prohibition of voir dire questioning on this issue violated the accused's Sixth Amendment right to the effective assistance of counsel.<sup>50</sup> In rejecting appellant's claim, the Court noted that the mere global incantation of the Sixth Amendment was insufficient to raise the constitutional issue, requiring counsel to cite specific legal authority and to argue it in support of such a proposition.<sup>51</sup>

## B. MITIGATION SPECIAL ISSUE

The Court of Criminal Appeals continued to resist constitutional challenges based upon alleged deficiencies in the consideration of mitigating evidence. In several cases, defendants convicted of capital murder and sentenced to death challenged the constitutionality of article 37.071.

In *Moore v. State*<sup>52</sup> and *Eldridge v. State*,<sup>53</sup> the Court rejected constitutional challenges that the absence of appellate review of the mitigation special issue permitted an arbitrary and capricious imposition of the death penalty, in violation of the principles enunciated in *Furman v.*

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45. See *id.* at 651.

46. See *id.*

47. See *Cantu v. State*, 939 S.W.2d 627, 632 (Tex. Crim. App. 1997) (en banc).

48. 934 S.W.2d 113, 118-19 (Tex. Crim. App. 1996) (en banc).

49. See *id.*

50. See *id.*

51. See *id.*

52. 935 S.W.2d 124, 128 (Tex. Crim. App. 1996) (en banc).

53. See *supra* note 39.



Georgia.<sup>54</sup> In *Eldridge*<sup>55</sup> and in *Cantu*,<sup>56</sup> the Court observed that mitigating evidence is not objectively defined and is deliberately left to the subjective standards of the jury.<sup>57</sup> Thus, appellate review of the jury's decision on the mitigation special issue is "impossible."<sup>58</sup> The Court, as had been done in the past, accordingly declined to review the jury's decision on the mitigation special issue, deferring to the jury's "unfettered" discretion as long as the jury "has all potentially relevant evidence before it. . . ."<sup>59</sup>

In *Eldridge*, the appellant also challenged the constitutionality of article 37.071, section 2(e) for failure to provide appellate review on the ground that article 44.251 on its face requires appellate review of the jury's determinations.<sup>60</sup> While conceding that article 44.251 of the Code of Criminal Procedure seems to require appellate review of the sufficiency of the evidence to support a negative answer to the special issue posed by article 37.071, section 2(e), the Court nevertheless concluded that "we cannot take the statute to mean what it plainly says."<sup>61</sup> The Court reasoned that a genuine sufficiency review of a jury's negative answer to the mitigation special issue would be "a logical absurdity."<sup>62</sup> No evidence is mitigating as a matter of law, the Court concluded.<sup>63</sup> Accordingly, it is not possible to review the jury's normative judgment in answering the mitigation special issue.<sup>64</sup> The Court distinguished review of guilt and innocence determinations, as well as the jury's conclusion regarding future dangerousness, as "decisions [that] are fact-bound and hence reviewable for sufficiency of the evidence,"<sup>65</sup> whereas no sufficiency review is possible with respect to the jury's "normative judgment" about the mitigation special issue.<sup>66</sup>

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54. 408 U.S. 238 (1972).

55. See *Eldridge*, 940 S.W.2d at 651-653.

56. See *Cantu*, 939 S.W.2d at 639-641.

57. See *Eldridge*, 940 S.W.2d at 651-53; *Cantu*, 939 S.W.2d at 639-41.

58. *Eldridge*, 940 S.W.2d at 651.

59. *Id.* at 652.

60. In pertinent part, article 44.251(a) requires the Court of Criminal Appeals to reform a sentence of death to a sentence of life imprisonment if there is insufficient evidence to support a negative answer to the mitigation special issue. The special issue of mitigation is submitted to the jury if it makes an affirmative finding of future dangerousness, that is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" and where the court's charge permitted conviction of a defendant as a party, "whether the defendant actually caused the death" or, if not, "intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (Vernon Supp. 1998). The special issue then presented is whether taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than the death penalty be imposed. *Id.* § 2(e).

61. *Eldridge*, 940 S.W.2d at 652.

62. *Id.*

63. See *id.*

64. See *id.* at 653.

65. *Id.* at 652.

66. *Id.* at 653.

## C. VICTIM IMPACT EVIDENCE

In *Johnson v. State*, the Court of Criminal Appeals sought to clarify and reconcile various decisions concerning the admissibility of victim impact evidence at the punishment phase of a capital murder trial.<sup>67</sup> Since that decision is pending on rehearing, it of course is subject to revision or withdrawal.

In *Payne v. Tennessee*, the Supreme Court held that there is no per se Eighth Amendment bar to victim impact evidence, leaving to the states questions regarding appropriate and admissible victim impact evidence.<sup>68</sup> The Court in *Payne* acknowledged the state's legitimate interest in counteracting a defendant's mitigating evidence by demonstrating the individuality of the victim, just as mitigating evidence may demonstrate the uniqueness of the capital murder defendant.<sup>69</sup>

In *Johnson*, the appellant argued that the court's various rulings were ambiguous and implicitly inconsistent.<sup>70</sup> In *Ford v. State*, victim impact evidence from the immediate family and surviving victims was allowed.<sup>71</sup> In *Smith v. State*, good character evidence regarding the victim was deemed inadmissible because such evidence encourages a "comparative judgment" about the worth of victims.<sup>72</sup> In *Goff v. State*, evidence of the deceased's homosexuality was excluded at trial as irrelevant, and the Court of Criminal Appeals upheld this determination.<sup>73</sup> In *Janecka v. State*, victim impact testimony was offered by a judge who was not related to the victim, and the Court of Criminal Appeals deemed the testimony irrelevant and inadmissible.<sup>74</sup>

Perceiving a need, in light of the foregoing authorities, to enunciate appropriate criteria for the admission of victim impact evidence, the Court in *Johnson* established the following criteria to govern the admission of victim impact evidence: (1) "the evidence must be relevant to a special issue during punishment or offered to rebut a defensive punishment theory" at the punishment phase of trial; (2) the probative value must not be outweighed by the prejudicial effect of the evidence; (3) "the testimony must come from either a surviving victim" or a family member or guardian; (4) the evidence must pertain to the impact upon the testifying individual's life; (5) the evidence must not create a "comparative judgment" situation; (6) "the evidence may not pertain to the character of the victim" unless it rebuts a defensive theory offered during punishment; and (7) the evidence must not address the value of the individual to the community.<sup>75</sup>

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67. See *Johnson v. State*, No. 72046, 1997 WL 209527 (Tex. Crim. App. April 30, 1997).

68. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

69. See *id.*

70. See *Johnson*, 1997 WL 209527, at \*1.

71. See *Ford v. State*, 919 S.W.2d 107, 112-16 (Tex. Crim. App. 1996) (en banc).

72. *Smith v. State*, 919 S.W.2d 96, 102 (Tex. Crim. App. 1996) (en banc).

73. See *Goff v. State*, 931 S.W.2d 537, 555-56 (Tex. Crim. App. 1996) (en banc).

74. See *Janecka v. State*, 937 S.W.2d 456, 472-73 (Tex. Crim. App. 1996) (en banc).

75. *Johnson*, 1997 WL 209527, at \*4.

In *Johnson*, the Court also held that the defendant's motions in limine regarding the character of the deceased and the impact of his death on the family did *not* preserve error for appeal.<sup>76</sup> The Court noted that specific objection must be made at the time the evidence is offered and that a general objection to victim impact evidence is insufficient because some evidence may be admissible even if part of the evidence is not.<sup>77</sup> The Court noted that if testimony includes both admissible and inadmissible aspects, a general objection to the whole does not preserve error, and the trial court can admit or deny all of the evidence.<sup>78</sup>

Although victim impact evidence was permitted in the punishment phase of the trial in *Johnson*, the defendant's proffered testimony by family and friends about the impact his execution would have on them was excluded at trial.<sup>79</sup> Since appellant had created no bill of exceptions, the Court concluded that it was not possible to assess the propriety of the proffered testimony since the content of such testimony was unknown.<sup>80</sup> Accordingly, the error was not preserved for review.<sup>81</sup>

Another interesting aspect of the *Johnson* decision involves the Court's having shielded county records from review, invoking the work-product doctrine.<sup>82</sup> The defendant sought an in-camera review of the county's capital murder summary sheets for a decade, in order to pursue his claim that his prosecution was racially motivated. The Court rejected this claim, invoking the work-product doctrine, a doctrine "vital in assuring the proper functioning of the criminal justice system."<sup>83</sup>

In *Cantu v. State*, the Court of Criminal Appeals held that it was error to admit victim impact evidence about a victim not named in the indictment.<sup>84</sup> Evidence about the assault was properly admitted at trial because it arose from the same incident.<sup>85</sup> However, the Court concluded that evidence at the punishment phase about the victim's good character and the impact on the family was not relevant, since the appellant was not on trial for her murder.<sup>86</sup> Thus, the evidence served "no purpose other than to inflame the jury."<sup>87</sup> "The danger of unfair prejudice . . . is unacceptably high."<sup>88</sup> Notwithstanding the erroneous admission of this particular victim impact evidence, however, the Court found that the evidence made no contribution to punishment and was therefore harmless beyond a reasonable doubt.<sup>89</sup>

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76. *See id.*

77. *See id.* at \*5.

78. *See id.*

79. *See id.* at \*8.

80. *See id.*

81. *See id.*

82. *See id.* at \*13.

83. *Id.*

84. *See Cantu*, 939 S.W.2d at 635-38.

85. *See id.* at 637.

86. *See id.*

87. *Id.*

88. *Id.*

89. *See id.* at 637-38.

D. ISSUES DECIDED IN CAPITAL CASES WHICH ALSO APPLY TO NON-CAPITAL CASES

Relying upon the Supreme Court's decision in *Ake v. Oklahoma*, which guaranteed access to expert assistance to indigent defendants, appellants in several cases argued that such assistance at trial had been unreasonably denied by the lower courts, in violation of the Fourteenth Amendment's guarantee of due process of law.<sup>90</sup>

In *Cantu*, the defendant wanted to hire a "scholar" to study jurors and their understanding of the special punishment issues.<sup>91</sup> Acknowledging that counsel "shall be reimbursed for reasonable expenses incurred with prior court approval for purposes of investigative and expert testimony,"<sup>92</sup> the Court emphasized that "access to the raw materials integral to the building of an effective defense" does not mean "all the assistance that [the defendant's] wealthier counterparts might buy."<sup>93</sup> The Court noted that the appellant had shown "no particularized need for this study."<sup>94</sup>

The request for expert assistance at trial was based upon a study conducted in Illinois that found that jurors did not understand the Illinois punishment statutes.<sup>95</sup> In that case, the district court held that the statute unconstitutionally permitted an arbitrary and unguided imposition of the death penalty.<sup>96</sup> However, as the Court noted,<sup>97</sup> the United States Court of Appeals for the Seventh Circuit overruled this holding.<sup>98</sup> In a previous decision, the Court of Criminal Appeals rejected a similar argument seeking funds for a jury selection expert.<sup>99</sup>

E. SANCTIONS

In an opinion supportive of the State's right to expert psychological evaluation of a defendant who intends to present expert psychological testimony, and which also strongly undergirds the trial court's inherent power to sanction, the Court of Criminal Appeals upheld a severe limitation upon a defendant's psychological expert testimony at trial.<sup>100</sup> In *Soria v. State*, the defendant's psychological expert was to testify at the punishment phase of trial. The Court of Criminal Appeals held "that when the defendant initiates a psychiatric examination and based thereon presents psychiatric testimony on the issue of future dangerousness, the trial court may compel an examination of appellant by an expert of the

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90. See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

91. See *Cantu*, 939 S.W.2d at 638-39.

92. *Id.* at 639 (citing TEX. CODE CRIM. PROC. ANN. art. 26.05(a) (Vernon 1979)).

93. *Id.* at 638 (quoting *Ake*, 470 U.S. at 77).

94. *Id.* at 639.

95. See *id.*

96. See *id.*

97. *Id.*

98. See *Free v. Peters*, 806 F.Supp. 705 (N.D. Ill. 1992), *aff'd in part, rev'd in part*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 513 U.S. 967 (1994).

99. See *Moore*, 935 S.W.2d at 130.

100. See *Soria v. State*, 933 S.W.2d 46, 51-59 (Tex. Crim. App. 1996).

State's or court's choosing. . . ."<sup>101</sup> However, the defendant refused the trial court's order to submit to an evaluation by the state's psychiatric expert. Therefore, the trial court limited the defendant's expert testimony to hypothetical questions as opposed to testimony regarding the defendant.<sup>102</sup> The Court of Criminal Appeals found the sanction to be fair, reasonable, and within the inherent authority of the court to control the fairness of the proceedings.<sup>103</sup>

#### F. FEDERAL HABEAS CORPUS

In *Turner v. Johnson*, the Fifth Circuit interpreted the Supreme Court's decision in *McFarland v. Scott*.<sup>104</sup> Turner's conviction and sentence of death had been affirmed by the Texas Court of Criminal Appeals.<sup>105</sup> Two state applications for writs of habeas corpus followed, and relief was denied by the Court of Criminal Appeals.<sup>106</sup> Turner then filed a federal habeas corpus petition and moved for a stay of execution and an evidentiary hearing.<sup>107</sup> The United States District Court denied relief and declined to issue a certificate of probable cause for appeal.<sup>108</sup> Turner filed a notice of appeal and secured a stay.<sup>109</sup>

The Fifth Circuit ruled that *Turner* was not entitled to the appointment of counsel or a stay order and that he had read *McFarland* too broadly. The Court in *Turner* found that, "[t]he *McFarland* court was concerned only with that period of time between the habeas petitioner's motion for the appointment of counsel and the filing of the initial petition.<sup>110</sup> A comprehensive petition had already been filed in *Turner*, so the *McFarland* mandate was not applicable."<sup>111</sup>

No evidentiary hearing was required, the court held, because Turner had received a full and fair hearing in the state court and could not demonstrate that a failure to hold a hearing would result in a miscarriage of justice.<sup>112</sup> Moreover, Turner could not show prejudice and cause for failure to develop the desired facts in state court.<sup>113</sup> The court found unpersuasive Turner's claim that he had inadequate time before the second state evidentiary hearing to develop forensic evidence.<sup>114</sup> Since he had not shown that his ability to subpoena witnesses or present exhibits

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101. *Id.* at 57 (footnote omitted).

102. *See id.* at 59.

103. *See id.*

104. *See Turner v. Johnson*, 106 F.3d 1178 (5th Cir. 1997) (interpreting *McFarland v. Scott*, 512 U.S. 849 (1994)).

105. *See Turner v. State*, 805 S.W.2d 423 (Tex. Crim. App.) (en banc), *cert. denied*, 502 U.S. 870 (1991).

106. *See Ex Parte Turner*, No. 26,853-01 (Tex. Crim. App. Sept. 7, 1994); *Ex parte Turner*, No. 26,853-02 (Tex. Crim. App. November 3, 1994).

107. *See Turner*, 106 F.3d at 1182.

108. *See id.*

109. *See id.*

110. *Id.* at 182-83 (footnote omitted).

111. *See id.*

112. *See id.*

113. *See id.* at 1184.

114. *See id.* at 1183.

was impeded, his claim did not discredit the full and fair hearing that had occurred at the state level.<sup>115</sup>

The court went on to observe that without a certificate of probable cause, there was no federal jurisdiction because, in order to receive appellate review, there must be a substantial showing of the denial of a federal right.<sup>116</sup> This means that "the issues presented are debatable among jurists of reason."<sup>117</sup> Following a substantive review of the issues raised by Turner, the court denied his request for appointment of counsel and for an evidentiary hearing.<sup>118</sup> Finding no "indicia of merit," the application for a certificate of probable cause was denied.<sup>119</sup>

### III. PRETRIAL PROCEDURES—SIGNIFICANT DECISIONS

#### A. CHARGING INSTRUMENT

In *Eastepp v. State*,<sup>120</sup> the State filed a motion to amend the indictment to delete the nine (of fifty) thefts that the defendant challenged as beyond the statute of limitations. The State's motion was granted ex parte, and the defendant subsequently objected that he had not received proper notice.<sup>121</sup> A defendant must be given notice before any amendment is made to an indictment.<sup>122</sup> The Court of Criminal Appeals affirmed the conviction, holding that abandonment of the nine thefts did not constitute an amendment.<sup>123</sup> The deletion of this material, the Court reasoned, did not affect the substance of the indictment and therefore was not an amendment to the indictment.<sup>124</sup>

A motion to quash is appropriate when the instrument charging the misdemeanor offense of failure to identify fails to allege that the defendant knew that the person asking for identification was a police officer.<sup>125</sup> In *Green v. State*, the Court of Criminal Appeals held that knowledge that the person is a police officer is a requirement that must be specifically pled, even though the statute does not specify such knowledge as an element.<sup>126</sup>

#### B. DEFENSE EXPERTS FOR INDIGENT DEFENDANTS

The continuing problem of when and to what extent an indigent de-

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115. See *id.* at 1184.

116. See *id.* at 1185-86.

117. *Id.* at 1186 (footnote omitted) (citing *Drew v. Collins*, 5 F.3d 93, 95 (5th Cir.), cert. denied, 510 U.S. 1171 (1994) (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983))).

118. See *id.* at 1190.

119. *Id.*

120. 941 S.W.2d 130, 132-34 (Tex. Crim. App. 1997) (en banc).

121. See *id.*

122. See TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1979).

123. See *Eastepp*, 941 S.W.2d at 135-36.

124. See *id.*

125. See TEX. PEN. CODE ANN. § 38.02(a) (Vernon 1987) (providing that a "person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information.").

126. 951 S.W.2d 3 (Tex. Crim. App. 1997) (en banc).

fendant is entitled to expert assistance under *Ake v. Oklahoma*<sup>127</sup> was also addressed by the Court of Criminal Appeals in the non-capital context. The requirements of *Ake v. Oklahoma* had previously been extended to non-capital cases.<sup>128</sup>

In *Taylor v. State*,<sup>129</sup> the defendant was indicted and tried for aggravated assault.<sup>130</sup> The recovery of semen from the victim's clothing permitted DNA typing. Since the State did not request DNA testing, however, the indigent defendant moved for the appointment of a particular expert to perform the DNA tests. Although the trial court granted the motion, it also ordered that the results be submitted to the court and the State as well.<sup>131</sup> The report's conclusion was that the defendant's DNA matched the sample from the victim's clothing. In response to this report, the defendant moved for a private expert to perform DNA testing, and the motion was denied.<sup>132</sup>

The court of appeals affirmed the defendant's conviction,<sup>133</sup> reasoning that the defendant was afforded the requested expert assistance and was not entitled to a second expert simply because he did not care for the test results.<sup>134</sup> The Court of Criminal Appeals reversed on the ground that the trial court and the court of appeals had wrongly characterized the original expert as a defense expert.<sup>135</sup> Since her report was provided to all parties, including the defendant's adversary, and the State then designated her as a witness for the State, she could not be characterized as a defense expert because the scientific results were protected from disclosure to the State by the work-product doctrine.<sup>136</sup> The Court of Criminal Appeals remanded the case to the trial court to determine whether the defendant had been deprived of due process by a denial of his request for an appointment of a private expert, a question dependent upon the complexity of the issues and the importance of the expert testimony to a viable defense.<sup>137</sup>

### C. SUBPOENAS

In *Coleman v. State*, the trial court granted the State's motion to quash defense subpoenas to newspaper reporters.<sup>138</sup> The Court of Criminal Appeals held that the lower court erred in refusing the subpoenas, reiter-

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127. 470 U.S. 68 (1971).

128. See e.g., *McBride v. State*, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992) (en banc).

129. 939 S.W.2d 148 (Tex. Crim. App. 1996) (en banc).

130. See *id.*

131. See *id.* at 152.

132. See *id.*

133. See *Taylor v. State*, No. A14-92-00781-CR (Tex. App.—Houston [14th Dist.] Dec. 1, 1994, pet. granted) (not designated for publication), 1994 WL 669173, at \*1, *vacated*, 939 S.W.2d 148 (Tex. Crim. App. Oct. 9, 1996).

134. See *id.* at \*2.

135. See *Taylor*, 939 S.W.2d at 153.

136. See *id.* at 152-53.

137. See *id.* at 151-53.

138. See *Coleman v. State*, No. 491-96, 1997 WL 209530 (Tex. Crim. App. Apr. 30, 1997) (en banc).

ating its holding in *Healey v. McMeans*<sup>139</sup> that there is no privilege that allows newsmen to withhold relevant evidence. The Court enunciated additional standards for assessing such subpoenas, noting that the mere request for a subpoena is a *prima facie* showing of the materiality of the witness' testimony, and that the burden is on the movant to show a basis for quashing the subpoena.<sup>140</sup> The movant must come forward with evidence of immateriality.<sup>141</sup> Upon a showing that the testimony is not material, the burden of persuasion shifts to the party who issued the subpoena to demonstrate that the testimony would be material.<sup>142</sup> The Court noted that the same standards apply to subpoenas duces tecum.<sup>143</sup>

#### D. LIMITATIONS

In *Ex Parte Matthews*, the Court of Criminal Appeals rejected the State's argument that the statute of limitations was tolled during the period of the defendant's absence from the state.<sup>144</sup> The Court held that the plain language of article 12.05(a)<sup>145</sup> made it clear that absence from the state does not toll the statute of limitations unless the absent person is actually "accused" of a crime at the time.<sup>146</sup> In *Matthews*, the defendant left the state after the alleged perjury occurred. However, the perjury was not discovered until after the statute of limitations had run. Since the defendant was not actually charged with the crime during the period of his absence, the exception to the limitations period set forth in article 12.05(a) did not apply.<sup>147</sup>

#### E. JEOPARDY

In *Stennett v. State*, the Court of Criminal Appeals, in a lengthy analysis, held that payment of any part of a tax levy on seized marijuana or another controlled substance constituted punishment under the double jeopardy clause, and, accordingly, subsequent prosecution of the defendant for possession of the controlled substance was barred.<sup>148</sup>

In *Tharp v. State*, the Court of Criminal Appeals held that the defendant's loss of his driver's license because of the results of a breathalyzer test was not punishment under the double jeopardy clause, and, therefore, subsequent prosecution for driving while under the influence was not barred.<sup>149</sup>

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139. 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc).

140. See *Coleman*, 1997 WL 209530, at \*4.

141. See *id.* at \*4-5.

142. See *id.* at \*5.

143. See *id.* at \*3.

144. See *Ex Parte Matthews*, 933 S.W.2d 134 (Tex. Crim. App. 1996) (en banc).

145. TEX. CODE CRIM. PROC. ANN. art. 12.05(a) (Vernon 1994) provides that "[t]he time during which the accused is absent from the state shall not be computed in the period of limitation."

146. See *Matthews*, 933 S.W.2d at 137.

147. See *id.* at 138.

148. See *Stennett v. State*, 941 S.W.2d 914, 917 (Tex. Crim. App. 1997) (en banc).

149. See *Tharp v. State*, 935 S.W.2d 157, 161 (Tex. Crim. App. 1997) (en banc).



## IV. TRIAL

## A. VOIR DIRE

During the Survey period, the Court of Criminal Appeals decided a number of cases clarifying the appropriate scope of voir dire questioning of prospective jurors and challenges for cause.

In *Atkins v. State*, the State was permitted, over objection, to ask members of the jury panel whether anyone would be unable to convict a person for possession of a residue quantity of cocaine.<sup>150</sup> Several persons who doubted that they could convict in those circumstances were successfully challenged for cause. The Court of Criminal Appeals held that it was improper to inquire how the veniremen would respond to particular circumstances presented by a hypothetical question.<sup>151</sup> Hypothetical questions are permissible to explain the application of the law, provided they are not used to commit the potential juror to a result under the specific facts of the case.<sup>152</sup> The Court characterized the State's questioning as an improper effort to commit jurors to a conviction on the facts of this case.<sup>153</sup>

In *Zinger v. State*, the State was permitted to ask on voir dire whether prospective jurors could convict "if you believed a witness beyond a reasonable doubt. . . ."<sup>154</sup> A prospective juror indicated that he could not find proof beyond a reasonable doubt on the basis of only one witness's testimony. The trial court sustained the State's challenge for cause, and the Court of Criminal Appeals reversed. Appellant argued that the juror's response indicated "only that his threshold for reasonable doubt was higher than the legal minimum to support a conviction, and this is permissible under *Garrett v. State* . . . ."<sup>155</sup> Without adopting this characterization of the issue, the Court of Criminal Appeals nevertheless found that the venireman's response was governed by *Garrett*, and was not grounds for a challenge for cause.<sup>156</sup>

In *Yarborough v. State*, the prosecutor defended a *Batson*<sup>157</sup> challenge to his peremptory strike of a minority member of the prospective jury panel, on grounds of alleged negative body language that suggested to the prosecutor that the person did not want to be on the jury.<sup>158</sup> The trial court allowed the peremptory strike.<sup>159</sup> The court of appeals disagreed, reversed the judgment and remanded for a new trial.<sup>160</sup> The Court of

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150. See *Atkins v. State*, 951 S.W.2d 787, 789 (Tex. Crim. App. 1996) (en banc).

151. See *id.* at 789.

152. See *id.* at 789-90.

153. See *id.*

154. *Zinger v. State*, 932 S.W.2d 511, 512 (Tex. Crim. App. 1996) (en banc).

155. *Id.* at 511 (citing *Garrett v. State*, 851 S.W.2d 853 (Tex. Crim. App. 1993) (en banc)).

156. See *id.* at 511-14.

157. *Batson v. Kentucky*, 476 U.S. 79 (1986).

158. See *Yarborough v. State*, 947 S.W.2d 892, 893-94 (Tex. Crim. App. 1997) (en banc).

159. See *id.* at 894.

160. *Yarborough v. State*, 868 S.W.2d 913 (Tex. App.—Fort Worth 1994), *rev'd* 947 S.W.2d 892 (1997).

Criminal Appeals granted the State's petition for discretionary review, and concluded that the prosecutor's uncontradicted and unchallenged observations must be taken as true.<sup>161</sup> The Court also rejected a *per se* rule that subjective evaluation must be substantiated by independent evidence, as the court of appeals had held.<sup>162</sup> Thus, while subjective evaluations may satisfy *Batson*, and there was a sufficient showing to defeat a contention that the peremptory strike was *per se* a pretext, the Court of Criminal Appeals reversed and remanded to the court of appeals for further evaluation of the peremptory challenge.<sup>163</sup>

In *Fritz v. State*,<sup>164</sup> the defense objected to the prosecutor's peremptory strike of seven males, since *Batson* principles apply to strikes based on gender as well as race.<sup>165</sup> The prosecutor's explanation was that he struck males under age thirty to avoid bias or shared identity with the defendant, who was a male under thirty. The Court of Criminal Appeals reversed the conviction because this explanation was not gender neutral.<sup>166</sup>

## B. JURY CHARGE

In *Reyes v. State*,<sup>167</sup> the Court of Criminal Appeals resolved a dispute among the courts of appeals about whether the failure to define reasonable doubt, as mandated by *Geesa v. State*,<sup>168</sup> is subject to a harmless error analysis where the defendant has failed to object to the omission.<sup>169</sup> In a four—four decision, with one judge concurring in the judgment and suggesting that he might reexamine *Geesa* in the future,<sup>170</sup> the Court held that omission of the definition of reasonable doubt is not subject to a harmless error analysis, even though the defendant did not object at trial.<sup>171</sup> However, the concurrence, with its open invitation for a reexamination of *Geesa*, indicates that the issue may not be settled.

In *Mitchell v. State*,<sup>172</sup> the State introduced four extraneous crimes against the defendant at the punishment phase of trial. The defendant requested a jury instruction that required proof beyond a reasonable doubt that the defendant had committed the crimes before they could be considered by the jury.<sup>173</sup> The trial court refused to give the requested instruction.<sup>174</sup> The Court of Criminal Appeals reversed the conviction on

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161. See *Yarborough*, 947 S.W.2d at 985.

162. See *id.* at 895-96.

163. See *id.* at 896.

164. 946 S.W.2d 844 (Tex. Crim. App. 1997) (en banc).

165. See *id.* at 844 (referring to *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)).

166. See *Fritz*, 946 S.W.2d at 847.

167. 938 S.W.2d 718 (Tex. Crim. App. 1996) (en banc).

168. 820 S.W.2d 154 (Tex. Crim. App. 1991) (en banc).

169. See *Reyes*, 938 S.W.2d at 721.

170. See *id.* at 721-22 (Meyers, J., concurring).

171. See *id.* at 721.

172. 931 S.W.2d 950 (Tex. Crim. App. 1996) (en banc).

173. See TEX. CODE CRIM. PROC. ANN., art. 37.07, § 3(a) (Vernon Supp. 1997) (requiring the admission of extraneous uncharged crimes at punishment, provided such crimes or acts are proved beyond a reasonable doubt to have been committed by the defendant).

174. See *Mitchell*, 931 S.W.2d at 951.

the ground that such an instruction must be given any time it is requested.<sup>175</sup> Such instructions have been required at the guilt phase of trial since 1994.<sup>176</sup> It is now clear that the same requirement applies to the introduction of extraneous crime evidence at the punishment phase.

In *Arevalo v. State*, the Court of Criminal Appeals held that the state must meet the same test as a defendant in order to receive a lesser, included offense instruction.<sup>177</sup> Under the *Aguilar* test, an offense is a lesser included offense and an instruction is permitted if it meets the criteria set forth in article 37.09,<sup>178</sup> and if there is some evidence in the record that the defendant, if guilty, is guilty only of the lesser offense.<sup>179</sup>

The defendant in *Arevalo* was indicted and tried for aggravated assault. At the close of trial, however, the State requested a lesser, included offense instruction on sexual assault, because it believed its case had certain weaknesses. The court gave a lesser, included offense instruction, even though the defendant objected that the evidence did not support the lesser, included offense.<sup>180</sup> The jury found the defendant guilty of sexual assault.<sup>181</sup>

The court of appeals affirmed the trial court's decision.<sup>182</sup> It ruled that the lesser, included offense instruction was appropriate, reasoning that the State implicitly alleges all lesser, included offenses when it alleges the primary offense, and the State should receive a lesser, included offense instruction any time it requests one.<sup>183</sup> The court of appeals imposed no requirement that the State meet the same test that a defendant must meet in order to receive a lesser, included offense instruction.<sup>184</sup> The Court of Criminal Appeals disagreed, and held that the State must meet the same test as the defense.<sup>185</sup>

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175. See *id.* at 954.

176. See *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994) (en banc).

177. See *Arevalo v. State*, 943 S.W.2d 887, 890 (Tex. Crim. App. 1997) (en banc).

178. See TEX. CODE CRIM. PROC. ANN., art. 37.09 (Vernon 1981), which provides:

An offense is a lesser included offense if:

- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
- (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

179. See *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) (en banc).

180. See *Arevalo*, 943 S.W.2d at 887.

181. See *id.*

182. See *id.* at 888.

183. See *id.*

184. See *id.*

185. See *id.* at 889-90.

## V. APPEAL

## A. GUILTY PLEA APPEALS

In an attempt to clarify a confusing area of the law, the Court of Criminal Appeals recently addressed the right to appeal a guilty plea where the voluntariness of the plea is attacked. In *Flowers v. State*,<sup>186</sup> the Court held that in plea bargain cases, defendants may challenge the voluntariness of the plea without complying with the special provisions of Rule 40(b)(1) of the Texas Rules of Appellate Procedure.<sup>187</sup>

Flowers entered into a plea agreement, and pled no contest to the charge of indecency with a child. The plea agreement contained the following provisions: (1) a sentence of three years confinement; (2) a fine of \$1,000; and (3) a promise that the State would recommend probation. It remained silent on Flowers' application for deferred adjudication.<sup>188</sup> The trial court accepted the plea, sentenced Flowers in accordance with the plea agreement, and required that Flowers serve 180 days in jail as a condition of probation.<sup>189</sup>

Flowers gave notice of appeal, but failed to comply with Texas Rule of Appellate Procedure 40(b)(1). In the court of appeals, Flowers argued that his plea was involuntary because the trial court did not admonish him properly concerning the conditions of probation and because his trial counsel specifically informed him he would not receive jail time.<sup>190</sup>

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186. 935 S.W.2d 131 (Tex. Crim. App. 1996) (en banc).

187. See *id.* at 134. See also TEX. R. APP. P. 40(b)(1), (Vernon 1986, amended 1990).

(b) Appeals in Criminal Cases.

(1) Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State.

*Id.*

188. Deferred Adjudication is a form of probation where no finding of guilt is entered. See TEX. CODE CRIM. PRO. ANN. art. 42.12, § 5(a) (Vernon Supp. 1998) which states:

(a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

189. See *Flowers*, 935 S.W.2d at 131.

190. See *id.* at 132.

The court of appeals dismissed Flowers appeal, concluding that it lacked jurisdiction because his notice of appeal did not comply with Rule 40(b)(1).<sup>191</sup> The court of appeals further held that the issue of the voluntariness of the plea was not a jurisdictional issue, so as to exempt Flowers from compliance with Rule 40(b)(1).<sup>192</sup>

The Court of Criminal Appeals, in a per curiam opinion, held that, in Texas, a defendant has always been able to appeal his conviction based on a plea of guilty or nolo contendere on the basis that it was not freely and voluntarily entered.<sup>193</sup> In reaching this conclusion, the Court discussed the *Helms* rule that applied to appeals from guilty pleas without a plea agreement.<sup>194</sup> This rule provides that "when a guilty plea is voluntarily and understandingly made, all nonjurisdictional defects that occurred prior to the entry of the guilty plea, including claimed deprivations of federal due process, are waived."<sup>195</sup> The *Helms* rule applies to pleas of guilty and nolo contendere entered without a plea bargain.<sup>196</sup> However, the Court in *Flowers* stated that, by its very terms, the *Helms* rule does not apply to bar appeal in a non-plea agreement case in which a defendant claims the plea was involuntary.<sup>197</sup>

In determining whether a defendant had the right to appeal in plea bargain cases where he claims his plea was involuntary, the Court examined the predecessor to Rule 40(b)(1)—article 44.02 of the Texas Code of Criminal Procedure.<sup>198</sup> The Court stated that article 44.02 permitted appeals on "jurisdictional issues, matters raised prior to trial by written motion, and issues the trial court permitted to be raised."<sup>199</sup> The *Flowers* court additionally noted that article 44.02 did not expressly include the right to raise jurisdictional issues, but stated that the Court had interpreted it to include this appellate right.<sup>200</sup> Under *Flowers* and the cases cited therein, defendants may appeal based on the voluntariness of the plea in both pleas with and without plea agreements.

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191. See *Flowers v. State*, No. 04-94-00577-CR, 1995 WL 570579 (Tex. App.—San Antonio, Sept. 29, 1995), *vacated by* 935 S.W.2d 131 (1996).

192. See *id.*

193. See *Flowers*, 935 S.W.2d at 134.

194. See *id.* at 132 (citing *Helms v. State*, 484 S.W.2d 925 (Tex. Crim. App. 1972)).

195. *Id.*

196. See *id.* at 133.

197. See *id.*

198. See *id.* See also TEX. CODE CRIM. PROC. ANN. art. 44.02 (Vernon 1979), which stated:

provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.

*Id.* This provision was replaced on September 1, 1986, with TEX. R. APP. P. 40(b)(1).

199. *Flowers*, 935 S.W.2d at 133.

200. See *id.*

Finding that Rule 40(b)(1), which replaced article 44.02, did not change this rule, the Court stated that appeals in plea bargain cases governed by Rule 40(b)(1) may challenge the voluntary nature of the plea.<sup>201</sup>

### B. MISSING EXHIBITS

The issues of whether exhibits are part of the statement of facts or the transcript and the effect of a lost exhibit on appeal were addressed in *Melendez v. State*.<sup>202</sup> The Court concluded that exhibits are part of the statement of facts, and when a complete statement of facts is requested by a defendant, the court reporter is required to include all admitted exhibits.<sup>203</sup>

Melendez attempted to challenge the sufficiency of the evidence to support his conviction in the court of appeals when it was determined that three of the eight exhibits admitted at the guilt stage were missing. Since the parties could not agree on a substitution of the exhibits, the court of appeals reversed the judgment<sup>204</sup> and remanded for a new trial in accordance with Texas Rule of Appellate Procedure 50(e).<sup>205</sup> In reaching this conclusion, the court of appeals concluded that an appellate court cannot review sufficiency of the evidence without a complete statement of facts and that the exhibits are part of the statement of facts.<sup>206</sup>

Having determined that the exhibits are a portion of the statement of facts, the court determined that, upon timely request for a complete statement of facts, a defendant has exercised the required diligence to have the exhibits made a part of the appellate record. Under Texas Rule of Appellate Procedure 50(e) he is therefore entitled to a new trial when portions of the statement of facts, including exhibits, are lost or destroyed without his fault.<sup>207</sup>

Melendez was charged with possession with intent to deliver cocaine. In the arguments before the court of appeals on the sufficiency question, both sides relied on testimony concerning evidentiary matter gathered at the scene, particularly sticks of gum in wrappers found in Melendez's car and a gum wrapper containing three plastic baggies of cocaine on the

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201. *See id.* at 134.

202. 936 S.W.2d 287 (Tex. Crim. App. 1996) (en banc).

203. *See id.* at 292.

204. *See Melendez v. State*, 902 S.W.2d 28, 30 (Tex. App.—Houston (1st Dist.) 1995, rev. granted).

205. TEX. R. APP. P. 50(e) (Vernon 1986, amended 1997) stated at the time:

(e) LOST OR DESTROYED RECORD. When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

These rules have been replaced with the new Rules of Appellate Procedure effective September 1, 1997.

206. *See Melendez*, 936 S.W.2d at 290.

207. *See id.* at 295.

ground next to the rear passenger door of a patrol car nearby. When these exhibits were determined to be missing, the court of appeals was unable to compare the exhibits to determine whether the jury could find beyond a reasonable doubt that the two gum wrappers were from the same pack of gum. Finding that Melendez had exercised diligence in his efforts to have the exhibits before the court for appellate review, the court ordered a new trial under Texas Rule of Appellate Procedure 50(e).<sup>208</sup> The Court of Criminal Appeals, finding the court of appeals' decision correct, affirmed the granting of the new trial.<sup>209</sup>

### C. PROPER SUFFICIENCY REVIEW

Overruling a long line of cases and finding *stare decisis* an insufficient reason to avoid such a departure in the law, the Court recently formulated new rules for measuring the sufficiency of the evidence. In *Malik v. State*,<sup>210</sup> the Court overruled *Benson v. State*,<sup>211</sup> *Boozer v. State*,<sup>212</sup> and *Arceneaux v. State*.<sup>213</sup>

The *Benson—Boozer* line of cases held that the sufficiency of the evidence is measured by the jury charge if that charge is more favorable to the defendant than the law requires and the state fails to object.<sup>214</sup>

*Benson* held that the sufficiency of the evidence is measured by the indictment as incorporated into the jury charge.<sup>215</sup> The *Benson* court held that the State's failure to object to an unnecessary narrowing in the jury charge of the descriptive element of the offense meant that the State was required to prove the element as described, and a failure to do so would result in an acquittal due to insufficient evidence.<sup>216</sup> In *Boozer*, the Court held that by failing to object to an erroneously submitted accomplice witness instruction, the State acquiesced in an increase of its burden of proof.<sup>217</sup>

Malik was charged with unlawfully carrying a weapon. The jury charge stated that the jury was required to find beyond a reasonable doubt that the defendant was driving his vehicle in a suspicious manner before they could consider the pistol or holster that was found in the car after being stopped. The jury charge then erroneously stated that if the jury failed to find this fact beyond a reasonable doubt they were to find Malik not guilty.<sup>218</sup>

The Court of Criminal Appeals found that under the *Benson-Boozer*

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208. *See id.* at 293-94.

209. *See id.* at 296.

210. 953 S.W.2d 234 (Tex. Crim. App. 1997) (en banc).

211. 661 S.W.2d 708 (Tex. Crim. App. 1982) (opinion on State's second motion for rehearing), *cert. denied*, 467 U.S. 1219 (1984).

212. 717 S.W.2d 608 (Tex. Crim. App. 1984) (en banc).

213. 803 S.W.2d 270 (Tex. Crim. App. 1990).

214. *See Malik*, 953 S.W.2d at 235.

215. *See Benson*, 661 S.W.2d at 715.

216. *See id.* at 715-16.

217. *See Boozer*, 717 S.W.2d at 610-12.

218. *See Malik*, 953 S.W.2d at 235-36.

line of cases, and particularly *State v. Arceneaux*,<sup>219</sup> the evidence was insufficient.<sup>220</sup> "In *Arceneaux*, the jury charge contained an instruction requiring the jury to find 'beyond a reasonable doubt that the exhibit introduced in evidence by the State [was] cocaine' before the defendant could be convicted."<sup>221</sup> By failing to object to the cocaine instruction, the State assumed the unnecessary burden to offer the cocaine into evidence. Because no cocaine had been introduced, the evidence was found insufficient to sustain the guilty verdict.<sup>222</sup>

The Court found the instruction in *Malik* to be similar to that in *Arceneaux*.<sup>223</sup> Both turned upon the status of a particular piece of evidence, and both improperly raised the State's burden of proof.<sup>224</sup> The Court therefore concluded that following *Arceneaux* would require reversal.<sup>225</sup>

Rather than following the *Arceneaux* and *Benson-Boozer* line of cases and finding the evidence insufficient, the Court in *Malik* overruled the entire set of authorities and formulated a new rule for measuring sufficiency of evidence.<sup>226</sup> In reaching its conclusion, the Court found that the *Benson-Boozer* line of cases failed to produce consistency in the law, and that the rule of these cases regularly produced results unanticipated by the constitutional doctrine on which it was based.<sup>227</sup>

The Court found that *Benson* and *Boozer* had erroneously relied upon federal constitutional precedent, which, in fact, did not support the rule.<sup>228</sup> The federal constitutional standard for reviewing sufficiency of the evidence is that of *Jackson v. Virginia*<sup>229</sup> that the *Malik* court found not to support the *Benson-Boozer* rule.<sup>230</sup> Under *Jackson*, the sufficiency review question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>231</sup> The Court in *Malik* held that "[i]f an element to be proved is incorporated into the charge merely because the State failed to object, and hence, unnecessarily increased its burden of proof, then that element cannot be an 'essential' element of the crime."<sup>232</sup>

The *Malik* court also stated that the Supreme Court has never imposed on any jurisdiction a requirement to measure the sufficiency of the evi-

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219. 803 S.W.2d 267 (Tex. Crim. App. 1990).

220. See *Malik*, 953 S.W.2d at 235.

221. *Id.*

222. See *id.*

223. See *id.* at 235-36.

224. See *id.* at 236.

225. See *id.*

226. See *id.* at 239-40.

227. See *id.* at 239.

228. See *id.*

229. 443 U.S. 307 (1979).

230. See *Malik*, 953 S.W.2d at 239.

231. *Jackson*, 443 U.S. at 319 (citations omitted).

232. *Malik*, 953 S.W.2d at 237.



dence by the jury charge.<sup>233</sup> The Court concluded that "the *Benson Boozer* rule is based upon a misinterpretation of federal constitutional precedent, results in complex and inconsistent standards for reviewing sufficiency of the evidence, and is fundamentally at odds with the purpose behind the *Jackson* standard of sufficiency review."<sup>234</sup> Based on this, the Court held that the sufficiency of the evidence will no longer be measured by the jury charge actually given.<sup>235</sup>

In replacing the *Benson-Boozer* rule, the Court recognized that measuring sufficiency by the indictment is an inadequate substitute because some important issues relating to sufficiency, such as the law of parties and transferred intent, are not contained in the indictment.<sup>236</sup> Therefore, the new rule is to measure sufficiency of the evidence "by the elements of the offense as defined by the hypothetically correct jury charge for the case."<sup>237</sup> According to the Court, such a charge would be one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried."<sup>238</sup>

#### D. COLLATERAL ATTACKS RAISING ACTUAL INNOCENCE

In *State v. ex rel. Holmes v. Court of Appeals*, the Court held that execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.<sup>239</sup> In *Holmes*, the Court announced that it would begin to entertain post conviction applications for writs of habeas corpus alleging actual innocence as an independent ground for such relief.<sup>240</sup>

In *Ex parte Elizondo*,<sup>241</sup> the Court extended this holding, determining that the Due Process Clause also forbids incarceration of an innocent person, and stating that post conviction habeas corpus challenges raising actual innocence would also be considered in non-death penalty cases.<sup>242</sup>

The standard announced in *Holmes* was that "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt."<sup>243</sup> It was under this standard that Elizondo

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233. *See id.* at 238.

234. *Id.* at 239.

235. *See id.*

236. *See id.*

237. *Id.* at 240.

238. *Id.*

239. *See State v. ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 391 (Tex. Crim. App. 1994) (en banc).

240. *See id.* at 398-99.

241. 947 S.W.2d 202 (Tex. Crim. App. 1996) (en banc).

242. *See id.* at 204-05.

243. *Holmes*, 885 S.W.2d at 399.

brought his post conviction application for writ of habeas corpus.<sup>244</sup>

Elizondo was convicted of aggravated sexual assault based solely on the testimony of his stepson, one of the alleged victims in the case. Thirteen years later, when the stepson and the other victim were grown, they both gave statements that the stepson's testimony was false and that Elizondo did not commit the offense.<sup>245</sup>

In reviewing whether to grant post conviction relief to Elizondo and others claiming actual innocence, the Court explained the application of the standard set out in *Holmes*.<sup>246</sup> The Court stated that an application for habeas relief based on a claim of actual innocence must "demonstrate that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different [on retrial]."<sup>247</sup>

The Court stated that the traditional sufficiency review under *Jackson v. Virginia*,<sup>248</sup> was inappropriate for this type of review, and that the Court's job "is not to review the jury's verdict but to decide whether the newly discovered evidence would have convinced the jury of applicant's innocence."<sup>249</sup>

In further elucidating this standard, the Court discussed the U.S. Supreme Court cases of *Schlup v. Delo*<sup>250</sup> and *Herrera v. Collins*.<sup>251</sup> In *Herrera*, the Supreme Court dealt with a claim that execution of a person who was actually innocent violated the Eighth and Fourteenth Amendments.<sup>252</sup> "In *Schlup v. Delo*, . . . the petitioner raised actual innocence in an effort to bring himself within the 'narrow class of cases' implicating fundamental miscarriage of justice as an exception to a showing of cause and prejudice for failure to raise [a habeas] claim in an earlier writ."<sup>253</sup> *Schlup*'s claim of innocence did not alone provide a claim for relief, but was tied to a showing of constitutional error at trial.<sup>254</sup> *Herrera*'s claim of actual innocence had nothing to do with the proceedings that led to his conviction, rather he simply claimed that execution of an innocent person would violate the Eighth Amendment.<sup>255</sup>

The Supreme Court applied a lesser burden to *Schlup*'s evidence of innocence than to *Herrera*'s.<sup>256</sup> Following this theory, the Court of Criminal Appeals in *Elizondo* stated that in claims of actual innocence that are not accompanied by a claim of constitutional error at trial, the habeas

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244. See *Elizondo*, 947 S.W.2d at 205 (citing *Holmes*, 885 S.W.2d at 398).

245. See *id.* at 209-10.

246. See *id.* at 206.

247. *Id.* (citing *Holmes*, 885 S.W.2d at 398).

248. See *supra* note 229.

249. *Elizondo*, 947 S.W.2d at 207.

250. 513 U.S. 298 (1995).

251. 506 U.S. 390 (1993).

252. See *id.* at 398.

253. *Elizondo*, 947 S.W.2d at 208.

254. See *Schlup*, 513 U.S. at 327.

255. See *id.*

256. See *id.*

courts must be convinced that the new facts unquestionably establish innocence.<sup>257</sup> This standard means that the petitioner must show, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence.<sup>258</sup> By contrast, when a claim of actual innocence is accompanied by a claim that the trial was infected with some other constitutional error, there is a lesser burden. In this situation, if the habeas court were merely convinced that the new facts raised sufficient doubt about the petitioner's innocence, so as to undermine confidence in the outcome of the trial without the assurance that the trial was untainted by constitutional error, then this threshold showing of innocence would justify a review of the merits of the other constitutional claims.<sup>259</sup>

In *Elizondo* the claim was one of actual innocence based on newly discovered evidence. No other constitutional claim was before the Court. The Court found the standard for granting a new trial to be met, and stated "we think that another jury hearing the evidence, including the newly discovered mature recantation of Robert's juvenile testimony, would view the new evidence as more credible and would acquit [sic.] applicant."<sup>260</sup> The Court stated that they were convinced by clear and convincing evidence that no rational jury would convict Elizondo in light of the new evidence, and granted him relief.<sup>261</sup>

#### E. PRETRIAL APPEAL BY THE STATE

The State has a right to appeal a pretrial order granting a motion to suppress evidence.<sup>262</sup> In *State v. Roberts*, the Court of Criminal Appeals made it clear that this right of pretrial appeal applies only to motions to suppress illegally obtained evidence.<sup>263</sup> The right of appeal does not arise if the exclusion of evidence is on other grounds.<sup>264</sup>

In *Roberts*, the defendant filed a "motion to suppress" former testimony of a complaining witness at a civil deposition. The trial court rejected the State's argument that the deposition testimony was admissible as "former testimony" under Texas Rule of Criminal Evidence 804(b)(1). The State appealed. The fact that the defendant had labelled his motion a "motion to suppress" was of no import, the Court reasoned, because the State's right to appeal adverse rulings on motions to suppress applies only to motions that seek suppression of illegally obtained evidence.<sup>265</sup> Thus, the Court held that the State could not appeal the trial court's ruling.<sup>266</sup>

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257. See *id.* at 209.

258. See *id.*

259. See *id.* at 208.

260. *Id.* at 210.

261. See *id.*

262. See TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon Supp. 1997).

263. See *State v. Roberts*, 940 S.W.2d 655, 660 (Tex. Crim. App. 1996) (en banc).

264. See *id.*

265. See *id.* at 660.

266. See *id.*